

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA

KEVIN MICHAEL BELL

Plaintiff,

v.

CITY OF LACEY; Police Chief DUSTY  
PIERPOINT individually; Police Commander  
JOE UPTON individually; City Attorney  
DAVID SCHNEIDER individually; Mayor  
ANDY RYDER individually; City Manager  
SCOTT SPENCE individually; DOEs 1-25  
individually; NISQUALLY TRIBE, Nisqually  
CEO JOHN SIMMONS, individually and  
Nisqually CFO ELETТА TIAM individually.

Defendants.

NO. 3:18-cv-05918-RBL

DEFENDANT NISQUALLY TRIBE'S  
SURREPLY IN RESPONSE TO  
PLAINTIFF'S MOTION FOR  
TEMPORARY RESTRAINING  
ORDER

Defendant Nisqually Tribe files this Surreply in Response to Plaintiff Kevin Michael Bell's Motion for Temporary Restraining Order (Dkt. #20), which the Court *sua sponte* converted to a motion for preliminary injunction. (Dkt. #27). Plaintiff's *praecipe* (Dkt. #26) and reply briefing (Dkt. #29) modify the scope of the relief sought in Plaintiff's Motion, and Nisqually therefore asks that the Court strike this untimely modification.

**I. PROCEDURAL HISTORY**

Plaintiff filed this action on November 9, 2018. (Dkt. #1-2). Plaintiff indicated serving the Nisqually Tribe on or about January 7, 2019. (Dkt. #13). He filed his Motion for Temporary Restraining Order for same-day consideration on February 19, 2019. (Dkt. #20). In that Motion,

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FLOYD, PFLUEGER & RINGER P.S.  
200 WEST THOMAS STREET, SUITE 500  
SEATTLE, WA 98119  
TEL 206 441-4455  
FAX 206 441-8484

1 Plaintiff specifically sought, in part, injunctive relief “prohibiting Nisqually Indian Tribe from  
 2 detaining Plaintiff at any time pending a final ruling on the merits.” (Dkt. #20). Plaintiff’s brief  
 3 did not address any injunction upon Nisqually’s jail officials. (*See* Dkt. #20).

4 Nisqually opposed this motion on February 21, 2019. (Dkt. #25). Nisqually’s brief  
 5 focused on its sovereign immunity and Plaintiff’s failure to prove waiver. (Dkt. #25 at 3-4).

6 Later that afternoon, Plaintiff filed a “praecipe” modifying his request for an injunction  
 7 against the Tribe. (Dkt. #26). Specifically, Plaintiff sought to modify his motion to seek  
 8 injunctive relief against jail officials, rather than Nisqually itself. (Dkt. #26). Plaintiff later  
 9 submitted a reply briefing that did not challenge Nisqually’s sovereign immunity. (Dkt. #29).  
 10 The brief ends with a request that the Court “prohibit the Nisqually tribal officials who operate  
 11 Nisqually Jail from detaining plaintiff.” (Dkt. #29 at 9).

## 12 II. AUTHORITY AND ARGUMENT

13 The Local Rules set out the standards for surreplies. LCR 7(g). If new facts or  
 14 arguments are introduced in a reply, the nonmoving party may file a surreply requesting that  
 15 the court strike the material. *Jinni Tech Ltd. v. Red.com, Inc.*, No. C17-0217JLR, 2017 U.S.  
 16 Dist. LEXIS 174279, at \*10 (W.D. Wash. Oct. 20, 2017) (Robart, J.). A surreply “shall be  
 17 strictly limited to addressing the request to strike,” and “[e]xtraneous argument or a surreply  
 18 filed for any other reason will not be considered.” LCR 7(g)(2).

19 “As a general rule, a ‘movant may not raise new facts or arguments in his reply brief’”  
 20 as doing so ‘essentially prevents [the nonmoving party] from providing any response.’” *United*  
 21 *States v. Washington*, 88 F. Supp. 3d 1203, 1217 (W.D. Wash. 2015) (Martinez, J.) (citation  
 22 omitted); *see also United States v. Puerta*, 982 F.2d 1297, 1300 n.1 (9th Cir. 1992) (“New  
 23 arguments may not be introduced in a reply brief.”) In *Washington*, the Court struck one party’s  
 24 legal arguments first offered on reply, notwithstanding their importance to the case, due to the  
 25 resulting “one-sided presentation.” *Washington*, 88 F. Supp. 3d at 1217.

26 Here, Nisqually requests that the Court strike any argument by Plaintiff requesting relief  
 27 against its jail officials, rather than the Tribe itself. Plaintiff’s Motion was clear that it sought

1 relief against Nisqually, rather than any specific individuals. Nisqually therefore did not brief  
 2 issues related to whether its sovereign immunity is implicated even if Plaintiff only names its  
 3 unnamed officials, which Nisqually posits it may well be. *See, e.g., Shermoen v. United States*,  
 4 982 F.2d 1312, 1320 (9th Cir. 1992) (“[A] suit may fail, as one v. the sovereign, even if it is  
 5 claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers,  
 6 if the relief requested can not be granted by merely ordering the cessation of the conduct  
 7 complained of but will require affirmative action by the sovereign....”). Moreover, Plaintiff’s  
 8 late modification came after the deadline for counsel for Does 1-25—which Plaintiff describes  
 9 as including Nisqually jail officers—to respond to the Motion. (Dkt. #1-2). It also allows  
 10 Plaintiff’s request to sidestep argument regarding whether the unnamed individuals named in  
 11 its Reply can, indeed, be bound by such relief. *See Fed. R. Civ. P. 65(d)(2)*. The  
 12 aforementioned concerns are particularly potent given the already expedited briefing schedule  
 13 upon which Plaintiff’s temporary restraining order motion was noted.

14 Nisqually therefore respectfully asks the Court to strike Plaintiff’s belated request for  
 15 injunctive relief against Nisqually tribal officials. Plaintiff’s request for injunctive relief should  
 16 be limited to the two entities he initially named in his Motion: the City of Lacey and Nisqually.

17 DATED this 4<sup>th</sup> day of March, 2019.

18 FLOYD PFLUEGER & RINGER, P.S.

19 /s/ Thomas B. Nedderman

20 Thomas B. Nedderman, WSBA No. 28944

21 William J. Dow, WSBA No. 51155

22 FLOYD, PFLUEGER & RINGER P.S.

23 200 W. Thomas Street, Suite 500

24 Seattle, WA 98119

25 Tel (206) 441-4455

26 Fax (206) 441-8484

27 [tnedderman@floyd-ringer.com](mailto:tnedderman@floyd-ringer.com)

[wdow@floyd-ringer.com](mailto:wdow@floyd-ringer.com)

*Counsel for Defendants Nisqually Tribe,*

*CEO John Simmons and CFO Eletta Tiam*

## DECLARATION OF SERVICE

Pursuant to RCW 9A.72.085, I declare under penalty of perjury and the laws of the State of Washington that on the below date, I delivered a true and correct copy of DEFENDANT NISQUALLY TRIBE'S SURREPLY IN RESPONSE TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER via the method indicated below to the following parties:

Jackson Millikan	<i>Counsel for Plaintiff</i>	<input type="checkbox"/> Via Messenger
Millikan Law Firm		<input type="checkbox"/> Via Email
2540 Kaiser Rd NW		<input type="checkbox"/> Via Facsimile
Olympia, WA 98502		<input type="checkbox"/> Via U.S. Mail
<a href="mailto:jackson@millikanlawfirm.com">jackson@millikanlawfirm.com</a>		<input checked="" type="checkbox"/> Via CM/ECF

Kent Underwood	<i>Counsel for Plaintiff</i>	<input type="checkbox"/> Via Messenger
Underwood Law		<input type="checkbox"/> Via Email
705 S. 9 <sup>th</sup> Street, Suite 205		<input type="checkbox"/> Via Facsimile
Tacoma, WA 98405		<input type="checkbox"/> Via U.S. Mail
<a href="mailto:Kent@underwoodlaw.us">Kent@underwoodlaw.us</a>		<input checked="" type="checkbox"/> Via CM/ECF

Robert W. Novasky	<i>Counsel for Defendants</i>	<input type="checkbox"/> Via Messenger
Forsberg & Umlauf, P.S.	<i>Does 1-25</i>	<input type="checkbox"/> Via Email
1102 Broadway Ste 510		<input type="checkbox"/> Via Facsimile
Tacoma, WA 98402-3534		<input type="checkbox"/> Via U.S. Mail
<a href="mailto:rnovasky@FoUm.law">rnovasky@FoUm.law</a>		<input checked="" type="checkbox"/> Via CM/ECF

John E. Justice	<i>Counsel for Lacey</i>	<input type="checkbox"/> Via Messenger
Law, Lyman, Daniel, Kamerrer &	<i>Defendants</i>	<input type="checkbox"/> Via Email
Bogdanovich, P.S.		<input type="checkbox"/> Via Facsimile
P.O. Box 11880		<input type="checkbox"/> Via U.S. Mail
Olympia, WA 98058		<input checked="" type="checkbox"/> Via CM/ECF
<a href="mailto:jjustice@lldkb.com">jjustice@lldkb.com</a>		

Daniel F. Mullin	<i>Counsel for Lacey</i>	<input type="checkbox"/> Via Messenger
Aaron P. Gilligan	<i>Defendants</i>	<input type="checkbox"/> Via Email
101 Yesler Way, Suite 400		<input type="checkbox"/> Via Facsimile
Seattle, WA 98104		<input type="checkbox"/> Via U.S. Mail
<a href="mailto:dmullin@masattorneys.com">dmullin@masattorneys.com</a>		<input checked="" type="checkbox"/> Via CM/ECF
<a href="mailto:agilligan@masattornys.com">agilligan@masattornys.com</a>		

DATED this 4<sup>th</sup> day of March, 2019 at Seattle, Washington.

/s/ Monica R. Howard  
Monica R. Howard, Legal Assistant